Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JAMES M. WHALEN,

Petitioner,

v.

MASSACHUSETTS TRIAL COURT; WILLIAM W. TEAHAN, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; ROBERT F. KUMOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; BARBARA DORTCH-OKARA, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; ROBERT E. FEIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: June 7, 2005

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QUESTIONS PRESENTED

I. Whether Judges sued in their individual capacities under 42 U.S.C. § 1983 should be entitled to qualified immunity where they have violated clearly established constitutional or statutory rights; and where, at the time of the action, Respondents had fair warning that their treatment of the Petitioner was unconstitutional or would likely trigger a constitutional violation;

II. Whether the Court of Appeals erred in affirming the District Court's Dismissal by means of Summary Judgment Petitioner's case upon grounds of mootness and qualified immunity, without hearing and where there existed genuine and triable issues of fact and law.

LIST OF PARTIES

1. Petitioner, James M. Whalen, Esq., of West Springfield, Massachusetts, is a citizen of Massachusetts and an appointed Assistant Clerk-Magistrate of the Massachusetts Trial Court, District Court Division since 1989;

2. Respondents, Hon. William W. Teahan, and Hon. Robert F. Kumor, are Judges of the Massachusetts Trial Court, both sitting in the Springfield District Court. Hon. Barbara Dortch-Okara was at all pertinent times relative to the action(s) complained of in this case serving as the Chief Administrative Justice of the Massachusetts Trial Court. Robert E. Fein, Esq. is the Clerk-Magistrate of the Springfield District Court. The Massachusetts Trial Court is a part of the Judicial Branch of the established constitutional government of the Commonwealth of Massachusetts.

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II. THIS COURT SHOULD FIND THAT, IN THE ABSENCE OF ANY RECORD ON THE ISSUE IN THE DISTRICT COURT BELOW, THE COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN AFFIRMING THAT COURT'S DISMISSAL OF THE CASE ON BOTH THE GROUNDS OF QUALIFIED IMMUNITY AS WELL AS MOOTNESS. 15

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The Massachusetts Governor's Committee on Judicial Needs

MEMORIAM in honor of Justice G. Joseph Tauro, Chief Justice of the Massachusetts Supreme Judicial Court (1976); Office of the Reporter of Decisions, Memorials, 421 Mass. 1603 (1976) 13

The Order of the United States District Court for the District of Massachusetts is reproduced in the Appendix (A. 1a); the opinion of the Circuit Court of Appeals for the First Circuit, #04-1976 is reproduced in the Appendix (B. 3a); and the Order of the United States Court of Appeals for the First Circuit is reproduced in the Appendix (C. 21a).

JURISDICTION

This Honorable Court has jurisdiction of this case pursuant to the provisions of 42 U.S.C. § 1983, Amendment V, and Amendment XIV to the United States Constitution, and otherwise the case precedents and laws of the United States, all of which are hereby respectfully invoked by the Petitioner.

CONSTITUTIONAL PROVISIONS

Constitution of Massachusetts, Article X, XI, XXX and Constitution of the United States of America, Amendments V and XIV.

STATEMENT OF CASE

Petitioner, a member of the Massachusetts Bar, was in March of 1989 duly appointed to the life-time office of Assistant Clerk-Magistrate in the Springfield District Court, in which capacity he served without interruption until September 13, 2002 when he was involuntarily removed from office without hearing and without cause.

Petitioner's removal, according to the then-Chief Justice for Administration and Management, Hon. Barbara Dortch-Okara, ostensibly was premised upon a shortfall in the Springfield District Court's operating budget, and styled as a layoff without qualification as to duration.

Petitioner retained counsel, and brought suit in the Federal District Court for the District of Massachusetts. The Parties were instructed to prepare a certified question for

presentment to the Massachusetts Supreme Judicial Court as to the meaning of the statute under which Petitioner was appointed to office. Without conducting any hearing on properly contested facts and law, including contradicting Affidavits before the Court filed by both sides, and prior to receiving an answer from the Massachusetts Court on the certified question, the District Court Judge granted Partial Summary Judgment to the Respondents on the issue of qualified immunity.

In March of 2004, the Petitioner was "recalled" to his position of Assistant Clerk-Magistrate by a successor Chief Justice for Administration and Management, Hon. Robert A. Mulligan. Petitioner returned to the Springfield District Court on March 29, 2004 to a position bearing the same title, but one qualitatively different in terms of benefits than that from which he had been removed, the substance of which had not been prior disclosed to him by the Respondents.

Respondents moved to dismiss the case on grounds of mootness, the fact that Amendment XI precluded recovery against the state directly, and the grant of Summary Judgment as to the issue of qualified immunity. The District Court Judge, Hon. Joseph L. Tauro, dismissed the case without issuing any written decision.

The dismissal was appealed to the Court of Appeals for the First Circuit on both grounds. The Panel of The Court of Appeals held that your Petitioner had suffered a constitutional injury: Respondents had violated Petitioner's Procedural Due Process rights (3-0). Sadly, however, and in the same breath, it affirmed (2-1) the District Court's granting of qualified immunity, with Senior Circuit Court Justice Stahl filing a Dissenting Opinion. This effectively shut the door to the Respondent's ability to seek redress of his grievances.

Respectfully, both the District Court and the Majority of the reviewing Panel, have failed to follow the case law pronounced by this United States Supreme Court that should apply to Petitioner's case. The ruling of the Court of

Appeals, if left unchallenged, will effectively re-define state law, and will continue to affect Petitioner's position with respect to his office. Unable to secure counsel on a contingent fee basis for this purpose, due to the severe economic harm inflicted by his unwarranted removal from office, the Petitioner has been forced to present, pro se, this humble Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

In this case, Judges, the sworn protector-interpreters of our laws and constitutions, federal and state, are the very actors who, according to the Opinion of The First Circuit, violated the constitutional rights of this Petitioner, an officer in the very court system within which the Respondents sit in judgment. A citizen serving as a member of a state's judicial system should enjoy no less protection of his constitutional rights than any other citizen. The Respondents should have erred on the side of caution where they were contemplating removing a tenured Assistant Clerk from his office, and conducted a hearing in accordance with the express provision and the manifest legislative intent of the appointing statute.

The case law cited by the Respondents, in the main, derive from fact patterns involving lower-level, extra-judicial branch, state officials such as police officers, teachers and prison guards. There is admittedly no exact precedential match to be found here. However, on the other hand, the actors who violated Petitioner's federal, constitutional right to due process in this case (and, Petitioner would argue substantive due process rights as well) include Judges, one of them a state's highest administrative Judge. Judges should be held to a higher standard of accountability than an ordinary government official. The test should not be whether a reasonable person would objectively have realized the unconstitutionality of a particular act. Rather, the

question should be whether, objectively viewed, a Judge, charged with knowledge of the laws federal and state, and of the U.S. Constitution and its several Amendments, reasonably ought to have known at the time that such an act either was in fact unconstitutional, or would likely trigger a constitutional violation. The shielding of the Respondents by grant of qualified immunity from an examination of their objective and subjective knowledge in connection with their action(s) translates our system of government from that which is ruled by law, to that which is ruled by men. A judicial system that countenances the granting of summary judgment in such a case as this does little to shore up faith in the courts' ability to be fair and impartial.

The District Court was remiss in failing to conduct any hearing on the issue of qualified immunity. It withdrew the certified question that it had presented to the Massachusetts Supreme Judicial Court before receiving an answer as to what were the parameters and meaning of the appointing statute at issue. Yet, it discordantly found that it was reasonable that the actors, the judges involved in depriving the Petitioner of his rights, reasonably might not have known that what they were doing was clearly violative of established law: This, despite the clarity of the language in the appointing statute requiring a hearing prior to removal, without exception or qualification. Massachusetts law also apprehends that state officials, including judges, may in the course of performing their duties violate the constitutional rights of citizens. To that end, it has established an indemnification statute, M.G.L. c. 258, § 9, to provide a remedy for this type of injury. The grant of qualified immunity in this case was unjust, shutting the door of justice upon this Petitioner, a thing that ought not be tolerated by the jurisprudence of this esteemed Court.

ARGUMENT

I. THE RESPONDENTS WERE FAIRLY WARNED THAT THEIR REMOVAL OF A VESTED ASSISTANT CLERK WAS UNLAWFUL, OR WOULD LIKELY TRIGGER A CONSTITUTIONAL VIOLATION.

The question of whether or not protection under the doctrine of qualified immunity should be extended to state actors hinges upon whether or not there exists "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The meaning of this doctrine was further elucidated in *United States v. Lanier*, 520 U.S. 529 (1997) a criminal case brought under 18 U.S.C. § 242. In that case, several women prosecuted their allegations that a state court judge had sexually assaulted them and had violated their rights under Amendment XIV to the U.S. Constitution. The judge was convicted. The Circuit Court of Appeals for the Sixth Circuit, sitting en banc, thereafter set aside the convictions:

> "[F]or lack of any notice to the public that § 242 covers simple or sexual assault crimes. Invoking general interpretive canons and *Screws v. United States*, 325 U.S. 91 (plurality opinion), the court held that § 242 criminal liability may be imposed only if the constitutional right said to have been violated is first identified in a decision of this Court, and only when the right has been held to apply in a factual situation "fundamentally similar" to the one at bar. The court regarded these combined requirements as substantially higher than the "clearly established" standard

> used to judge qualified immunity in civil cases under 42 U.S.C. § 1983."

Lanier, at 529.

The Supreme Court more succinctly reflected the Sixth Circuit's holding:

> "[T]he Sixth Circuit held that criminal liability may be imposed under § 242 only if the constitutional right said to have been violated is first identified in a decision of this Court (not any other federal, or state, court), and only when the right has been held to apply in "a factual situation fundamentally similar to the one at bar." *United States v. Lanier*, 73 F. 3d, at 1393."

The U.S. Supreme Court, differentiating the "clearly established" standard under 42 U.S.C. § 1983 then went on to set aside the convictions upheld by the Sixth Circuit, holding:

> "Because the Court of Appeals used the wrong language in deciding whether prior judicial decisions gave fair warning that respondent's actions violated constitutional rights, we vacate the judgment and remand for application of the proper standard."

Ibid.

This Court thus established that it was not necessary for the purpose of qualified immunity analysis that a fundamentally similar factual scenario, even under a criminal federal rights prosecution, have prior arisen and been addressed in U.S. Supreme Court case precedent before